STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2010
V	No. 290029 Wayne Circuit Court
RALPH STEGALL, Defendant-Appellant.	LC No. 08-012105-01-FC

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1)(e). Defendant was sentenced to 27 to 44 years' imprisonment for the CSC conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first contends that the prosecution denied him a fair trial by making an improper comment during its closing argument. While we agree that the comment in question was improper, we conclude that defendant is not entitled to relief because the error was harmless.

In reviewing a claim of prosecutorial misconduct, this Court analyzes the context of the prosecutor's comments to ascertain whether the defendant was denied a fair and impartial trial. *People v Truong*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Even where this Court finds that a prosecutor's conduct was improper, relief is not warranted if the error was harmless. *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996). When determining whether an error harmless, the error's effect "is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

During her closing argument, the prosecutor commented on defendant's failure to call Lola O'Neil to testify after defendant asserted that O'Neil could verify his accounts of the various sexual assaults. As the prosecution notes on appeal, "[i]t is within the permissible scope of a prosecutor's closing argument to comment upon the failure of the defendant to produce a witness who could have corroborated the defendant's version of the facts." *People v Harris*, 113 Mich App 333, 337-338; 317 NW2d 615, 618 (1982). However, our Supreme Court has established that "[a] lawyer may not knowingly offer inadmissible evidence or call a witness

knowing that he will claim a valid privilege not to testify." *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1979). In reliance on *Giacalone*, this Court has previously held that where it appears that a potential witness for the defense would invoke his or her Fifth Amendment rights if called to testify, it is improper for the prosecution to comment on the defendant's decision to not call that witness. *People v Swindlehurst*, 120 Mich App 606, 612; 328 NW2d 92 (1982). Specifically, this Court stated, "[a] prosecutor should not denigrate an opponent for failure to do something which would have been improper if done." *Id*. Based on the holding in *Giacalone*, we hold that it would have been improper for defendant to call O'Neil to testify as it was highly likely that she would have invoked the Fifth Amendment. During each assault, O'Neil was in the same room as defendant when he assaulted his victim. O'Neil told two of the victims that if they wanted the assault to end, they should cooperate with defendant. Furthermore, O'Neil was with defendant when he picked up two of the victims. She helped undress one of the victims and provided defendant with a pillow and lubricant to assist with one of the assaults. Based on the extensive evidence of her involvement in the assaults, defense counsel certainly had reason to believe that O'Neil would refuse to testify for fear of self-incrimination. Consequently, *Swindlehurst* prohibited the prosecution's comment during its closing argument.

Despite the fact that the prosecutor's comment during closing arguments was improper under *Swindlehurst*, defendant is not entitled to relief because the error was harmless. Defendant's conviction did not arise from the prosecutor's brief statement during her closing argument. Rather, the conviction resulted from the overwhelming evidence presented at trial. Due to the trial court's ruling regarding other acts evidence, the jury heard evidence from three different women who had been sexually assaulted by defendant. In each instance, defendant's method of committing his crime was fairly similar. The jurors observed the demeanor of the various victims and obviously determined that the women were credible. Even if the prosecution had never commented on O'Neil's absence, the jury would have still been permitted to consider the testimony of the various victims and defendant. The outcome of this trial would have been no different.

Additionally, the trial court instructed that the jury was to base its verdict on the evidence and that the lawyers' statements were not classified as evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not established that the jurors improperly considered the prosecutor's statement when reaching their verdict.

Next, defendant takes issue with the admissibility of evidence of his previous sexual assaults pursuant to MRE 404(b). Defendant does not contend that the trial court abused its discretion in admitting the evidence. Rather, defendant acknowledges that the evidence was admissible pursuant to our Supreme Court's holding in *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000). Defendant further recognizes that this Court is bound to follow the decision in *Sabin*. Consequently, defendant is not entitled to relief.

Affirmed.

s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens